STATE OF MICHIGAN

IN THE SUPREME COURT

(Appeal from the Court of Appeals)

122335

LISA ROBERTS,

Plaintiff-Appellee,

Supreme Court Docket No. ~~116563~~ ~~116570~~ ~~116573~~

Court of Appeals Docket No. 212675

Lower Court No. 97-12006-NH

vs

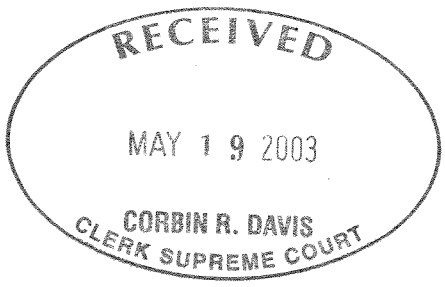
MECOSTA COUNTY GENERAL HOSPITAL, a Michigan County Hospital, GAIL A. DESNOYERS, M.D., MICHAEL ATKINS, M.D., BARB DAVIS, OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C., a Michigan professional corporation, f/k/a GUNTHER, DESNOYERS & MEKARU, jointly and severally,

Defendants-Appellants.

BRIEF ON APPEAL
DEFENDANTS/APPELLANTS GAIL A. DESNOYERS, M.D., BARB DAVIS, AND OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C.

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE



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DEFENDANT-APPELLANTS ANSWER "YES."

PLAINTIFF-APPELLEE ANSWERS "NO."

COURT OF APPEALS ANSWERS "NO."

II. IS STRICT COMPLIANCE REQUIRED FOR AN MCL 600.2912b(4) NOTICE OF INTENT TO COMPLY WITH THE STATUTORY REQUIREMENTS?

DEFENDANT-APPELLANTS ANSWER "YES.

PLAINTIFF-APPELLEE ANSWERS "NO."

COURT OF APPEALS ANSWERS "NO."

III. BY FAILING TO COMPLY WITH THE REQUIREMENTS OF MCL 600.2912b(4) DOES THE PLAINTIFF'S COMPLAINT FAIL TO COMPLY WITH THE STATUTE OF LIMITATIONS BECAUSE THE PLAINTIFF CANNOT INVOKE THE TOLLING PROVISION OF MCL 600.5856?

DEFENDANT-APPELLANTS ANSWER "YES.

PLAINTIFF-APPELLEE ANSWERS "NO."

COURT OF APPEALS ANSWERS "NO."

STATEMENT OF FACTS AND PROCEEDINGS

This is a claim for medical malpractice. Plaintiff-Appellee, Lisa Roberts, ("Plaintiff") alleges a claim for medical malpractice against several Defendants. As to Defendants-Appellants Gail A. DesNoyers, M.D., Barb Davis and Obstetrics & Gynecology of Big Rapids, P.C. ("Defendants DesNoyers, Davis and OB/GYN"), the Plaintiff claims medical malpractice arose out of medical treatment provided on October 4, 1994 at Obstetrics & Gynecology of Big Rapids, P.C. Gail A. DesNoyers, M.D. is an obstetrician at this office, and Barb Davis is a physician's assistant.

A. The Statute Involved: MCL 600.2912b

MCL 600.2912b(1) provides that a plaintiff shall not commence a medical malpractice action unless the health care provider is given a written notice as provided under this statute. This notice is commonly referred to as a "Notice of Intent." MCL 600.2912b(2). MCL 600.2912b(4) sets forth what a Notice of Intent shall contain:

> (4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) the manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

B. Plaintiff's Notice of Intent

Plaintiff served a Notice of Intent dated September 23, 1996. (Appellant's Appendix, page 3A – 4A). The Plaintiff set forth the factual basis of her claim in paragraph 1:

> This is a claim for negligence which occurred on October 4, 1994, at Obstetrics & Gynecology of Big Rapids. It is claimed that on said date while pregnant with her first child, Claimant presented herself to Barb Davis, PAC, Dr. Michael Atkins, and Dr. Gail DesNoyers complaining of severe abdominal pain and bleeding. At that time a diagnosis of a spontaneous abortion was made and a D & C was performed at Mecosta County General Hospital. Claimant was sent home at that time, despite Dr. DesNoyer's knowledge of Claimant's history of a prior ectopic pregnancy.
>
> Over the course of the next few days, Claimant continued to experience pain and cramping and, on October 7, 1994, was seen at Mecosta County General Hospital by Dr. Michael Atkins. Claimant was told that the pain she was experiencing was cramps from the D & C she had done and was sent home.
>
> Claimant returned to the hospital on October 8, 1994, wherein it was discovered that Claimant had not had a spontaneous abortion but had an ectopic pregnancy in her left tube which had burst. Emergency surgery was performed at that time and her left tube was removed.
>
> Claimant had her right tube removed approximately ten years ago and, as a result of the negligence set forth above, she is now unable to have any children.

In paragraph 2 the Plaintiff set forth the applicable standard of care:

> Claimant contends that the applicable standard of care required that Obstetrics & Gynecology of Big Rapids, Dr. Gail DesNoyers and Barb Davis, PAC, provide the Claimant with the services of competent, qualified and licensed staff of physicians, residents, interns, nurses and other employees to properly care of her, render competent advice and assistance

> in the care and treatment of her case and to render same in accordance with the applicable standards of care.

As to the information required under subparagraphs (c), (d) and (e) Plaintiff referred to paragraph 2 in her Notice of Intent.

The insurer for Defendants DesNoyers, Davis and OB/GYN, PICOM Insurance Company, responded by correspondence on October 7, 1996. (Appellant's Appendix, page 5A). The claims consultant assigned to this case for PICOM Insurance Company, Mary Lindholm, requested the identity of Plaintiff's health care providers, and she requested signed authorizations. (Appellant's Appendix, page 5A). Plaintiff's counsel acknowledged receipt of this correspondence on October 9, 1996. (Appellant's Appendix, page 6A). Thereafter, Ms. Lindholm repeated her efforts to have Plaintiff identify her health care providers and obtain authorizations for the release of those records from Plaintiff. Ms. Lindholm sent follow-up correspondence on October 29, 1996, November 25, 1996 and January 14, 1997. (Appellant's Appendix, pages 7A, 8A, 9A). Ms. Lindholm did not receive an executed authorization until it was enclosed with correspondence from Plaintiff's counsel dated March 7, 1997. (Appellant's Appendix, page 10A).

C. Trial Court Proceedings

Meanwhile, Plaintiff filed her Complaint against Defendants DesNoyers, Davis and OB/GYN as well as Michael L. Atkins, M.D. ("Defendant Atkins") and Muskegon County General Hospital ("Defendant MCGH"). (Appellant's Appendix, page 12A). This was filed on February 25, 1997. Thereafter, Defendants DesNoyers, Davis and OB/GYN filed several motions for summary disposition, including a claim that the Plaintiff's Notice of Intent failed to comply with the statutory requirements of MCL

600.2912b(4). This motion was brought under MCR 2.116(C)(7). This motion was heard on October 17, 1997. (Appellant's Appendix, pages 81A – 137A).

In an opinion issued on May 6, 1998 the trial court granted Defendants DesNoyers, Davis and OB/GYN's motion for summary disposition and dismissed Plaintiff's Complaint. (Appellant's Appendix, pages 138A – 148A). The trial court granted this motion because the Plaintiff's Notice of Intent failed to meet the statutory requirements of MCL 600.2912b(4) thereby making Plaintiff's Complaint time barred pursuant to the statute of limitations. The trial court reasoned that because Plaintiff's Notice of Intent did not comply with the requirements of MCL 600.2912b(4), the two-year statue of limitations under MCL 600.5805(4) was not tolled. MCL 600.5856. An "Order of Dismissal With Prejudice" was entered on June 17, 1998. (Appellant's Appendix, pages 150A – 151A).

D. Appellate Proceedings

Plaintiff appealed the trial court's decision to the Michigan Court of Appeals. In a decision dated March 3, 2000 the Court of Appeals reversed and remanded this matter to the trial court for further proceedings consistent with its Opinion. (Appellant's Appendix, page 152A – 160A). All Defendants applied for Leave to Appeal to the Supreme Court. This application was granted. In an opinion dated April 24, 2002 the Supreme Court reversed and remanded the case to the Court of Appeals for a determination whether the trial court erred in concluding that plaintiff's notices of intent did not comply with §2912b(4). (Appellant's Appendix, pages 161A – 187A).

On August 27, 2002 the court of Appeals held that plaintiff's Notice of Intent did comply with §2912b(4). (Appellant's Appendix, pages 188A – 193A). All defendants

again applied for Leave to Appeal to the Supreme Court. This application was granted on March 25, 2003. (Appellant's Appendix, pages 194A – 195A):

> On order of the court, the applications for leave to appeal from the August 27, 2002 order of the Court of Appeals are considered, and they are GRANTED. Among the issues to be briefed, the parties shall address whether plaintiff complied with the requirements of MCL 600.2912b(4) and whether strict compliance or some lesser standard of compliance applies to plaintiff's Notice of Intent under that provision.

Defendants DesNoyers, Davis and OB/GYN now ask this Honorable Court to reverse the Court of Appeals April 24, 2002 decision and affirm the lower court's ruling.

ARGUMENT

I. THE COURT OF APPEALS INCORRECTLY CONCLUDED THAT PLAINTIFF'S NOTICE OF INTENT CONTAINED THE STATEMENTS REQUIRED IN MCL 600.2912b(4)(c), (d), and (e).

A. Principles of Statutory Construction

This matter involves a question of statutory construction. The Supreme Court reviews questions of statutory construction de novo. *Donajkowski v Alpena Power Company*, 460 Mich 243, 248; 596 NW2d 574 (1999). The fundamental task of statutory construction is to discover and give effect to the intent of the legislature. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). The task of discerning the legislature's intent begins by examining the language of the statute itself. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). Where the language of the statute is unambiguous, the plain meaning reflects the legislature's intent and the court applies the statute as written. Judicial construction under such circumstances is not permitted. *Id.* When construing a statute, the court must presume that every word has some meaning and should avoid any construction that would render any part of the statute surplusage or nugatory. *Altman v Meridian Township*, 440 Mich 1204; 487 NW2d 155 (1992). The court may consult dictionary definitions when terms are not expressly defined by statute. *Oakland County Board of County Road Commissioners v Michigan Property and Casualty Guaranty Association*, 456 Mich 590, 604; 575 NW2d 751 (1998).

B. MCL 600.2912b(4) Requires That a Notice of Intent "Contain a Statement" of Six Enumerated Items

§2912b(4) mandates that a Notice of Intent shall "contain a statement" of at least six enumerated items:

> (4) The notice given to a health professional or health facility under this section shall ***contain a statement*** of at least all of the following . . . .

The statute then lists the information the Notice of Intent must contain in subparagraphs (a) through (f). This requirement was recognized by the Court of Appeals:

> We find the statute to be clear and unambiguous, requiring that the Notice of Intent must, at a minimum, "contain a statement" of the six enumerated items.

Roberts v Mecosta County General Hospital, 252 Mich App 664, 667; 653 NW2d 441 (2002).

MCLA 600.2912b does not define "contain" or "statement." *Merriam-Webster's Dictionary* (OnLine ed.) defines "contain" as "to have within." In interpreting another statute, the *Random House Webster's College Dictionary* (1995) was cited to define "statement":

> Resorting to a dictionary, one finds that "statement" is something stated, "a communication or declaration in speech or writing, setting forth facts, particulars, etc.," or "a single sentence or assertion."

Oade v Jackson National Life Insurance Company of Michigan, 465 Mich 244, 257; 632 NW2d 126 (2001). What the foregoing definitions indicate, and what seems obvious, is that a document which purports to "contain a statement" must actually *state it*. If something is not stated, it is not a "statement." To comply with §2912b(4) the statement must be within the Notice of Intent. If a statement is not contained in the Notice of Intent, the Notice of Intent is defective.

C. The Plaintiff's Notice of Intent Does Not Contain the Statements Required Under §2912b(4)(c), (d) and (e)

Defendants DesNoyers, Davis, and OB-GYN do not contest that the Plaintiff's Notice of Intent contains a statement of the factual basis for the claim as required under §2912b(4)(a). Defendants DesNoyers, Davis, and OB-GYN do not contest that the Plaintiff's Notice of Intent contains a statement of the applicable standard of practice or care as required under §2912b(4)(b). The Plaintiff's Notice of Intent states that Defendants DesNoyers, Davis, and OB-GYN should hire competent personnel to treat the Plaintiff.[1] However, Defendants DesNoyers, Davis, and OB-GYN contest the Court of Appeals' finding that the Plaintiff's Notice of Intent "contains a statement" that complies with §2912b(4)(c), (d), or (e). The Plaintiff's Notice of Intent does not contain these statutory requirements.

Section 2912b(4)(c) requires a statement of "the manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility." The Plaintiff's Notice of Intent refers the reader to paragraph 2. However, nothing in paragraph 2 explains how the Defendants failed to hire competent personnel. Because this statement obviously does not explain the manner in which Defendants breached the standard of care, the Court of Appeals combed through the Plaintiff's Notice of Intent to try to harvest such a statement. The Court of Appeals looked to paragraph 1 of the Plaintiff's Notice of Intent to find this statement:

> If we examine the respective first paragraphs of the notices (the factual basis of the claim), we do find a statement of the manner in which plaintiff claims the standard of practice or care was breached.

[1] This is the same standard of practice the plaintiff alleges against co-Defendant Mecosta County General Hospital.

Roberts, supra, 252 Mich App at 672. The Court of Appeals then identified the "statement" contained in paragraph 1 of Plaintiff's Notice of Intent.

> Specifically, the notices clearly state that the medical personnel incorrectly diagnosed a spontaneous abortion rather than an ectopic pregnancy, resulting in the loss of plaintiff's only remaining fallopian tube, thus, rendering her sterile.

Roberts, supra, 252 Mich App at 672. However, Plaintiff's Notice of Intent does not state what the Court of Appeals claims it states. Nowhere in Plaintiff's Notice of Intent does Plaintiff state that the medical personnel "incorrectly" diagnosed a spontaneous abortion rather than an ectopic pregnancy. If Plaintiff meant this she certainly would have said so. Presumably she did not mean this because it's not what she said. Moreover, the Plaintiff's Notice of Intent does not state that incorrectly diagnosing a spontaneous abortion rather than an ectopic pregnancy was a breach of the standard of care. It is not stated in paragraph 1 or any other paragraph in Plaintiff's Notice of Intent. Consequently, because Plaintiff does not state it, it is not a "statement." The Plaintiff's Notice of Intent does not "contain" the statement required under §2912b(4)(c).

Section 2912b(4)(d) requires a statement of "the alleged action that should have been taken to achieve compliance with the alleged standard of practice or care." The Plaintiff's Notice of Intent states: "See paragraph 2 above." In finding that this requirement was met the Court of Appeals again looked to paragraph 1 rather than paragraph 2 in Plaintiff's Notice of Intent. The Court of Appeals stated:

> Clearly, when reading the notices as a whole, plaintiff alleges that the action which should have been taken is to have timely diagnosed the ectopic pregnancy so that it could have been treated without the loss of plaintiff's left fallopian tube.

Roberts, supra, 252 Mich App at 672. However, the Plaintiff's Notice of Intent does not state this. Nowhere does Plaintiff's Notice of Intent state that Defendants should have "timely" diagnosed the ectopic pregnancy so that it could have been treated without the loss of Plaintiff's left fallopian tube. Again, the Notice of Intent does not "contain a statement" that fulfills this requirement.

Section 2912b(4)(e) requires a statement of "the manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." Plaintiff's Notice of Intent states: "See paragraph 2 above." In finding that the Plaintiff's Notice of Intent met this statutory requirement, the Court of Appeals again looked to paragraph 1 of the Plaintiff's Notice of Intent, the factual basis of her claim. The Court of Appeals stated:

> Specifically, plaintiff clearly states that the misdiagnosis resulted in having to have emergency surgery four days later to remove her only remaining fallopian tube as a result of the tube bursting from the undiagnosed ectopic pregnancy, thus rendering her sterile.

Roberts, supra, 252 Mich App at 673. However, the Plaintiff's Notice of Intent does not state this. It does not state that a misdiagnosis resulted in emergency surgery, which resulted sterility. (Throughout the trial court and appellate proceedings the Plaintiff's assertion that she cannot have children seems to have changed from an allegation to a presumed fact. However, it is false. The Plaintiff can have children through artificial means such as in vitiro fertilization.) Moreover, it does not describe the manner the breach of the standard of practice was the proximate cause of Plaintiff's injuries. I.e., the Notice of Intent must state more than simply "X" proximately caused "Y." Rather, the Notice of Intent must state *the manner* in which the injury occurred. Plaintiff's Notice of

Intent does not do this. Therefore, there is no "statement" fulfilling the requirements of §2912b(4)(e).

In summary, the Court of Appeals re-wrote Plaintiff's Notice of Intent. By finding non-existent statements the Court of Appeals renders the statutory requirement that the Plaintiff's Notice of Intent "contain a statement" nugatory. This is an incorrect application of MCL 600.2912b(4). *Altman, supra.* The Court of Appeals has effectively written out of the statute the requirement that there be written statements containing the required information. Its decision, therefore, is clearly erroneous. It will cause material injustice by depriving the Defendants of the written statutory notice they are entitled to receive prior to commencement of Plaintiff's lawsuit.

It is illuminating to compare the content of Plaintiff's Notice of Intent (Appellant's Appendix, pages 3A – 4A) with the content of her Complaint (Appellant's Appendix, pages 12A – 24A). The difference between Plaintiff's Notice of Intent and her Complaint is like the difference between night and day. Other than the factual basis for the claim, virtually nothing in Plaintiff's Notice of Intent notified Defendants DesNoyers, Davis and OB/GYN, of what was to come in Plaintiff's Complaint. While Defendants are not advocating that the content of a Notice of Intent must be the same as what is required for a complaint, Defendants are advocating that a Notice of Intent must contain the information specified in §2912b(4). Plaintiff's Notice of Intent did not do this. Consequently, Plaintiff's Notice of Intent is no notice at all.

The Plaintiff's Notice of Intent does not contain all the requirements of §2912b(4). Therefore, the Court of Appeals August 27, 2002 decision should be reversed and the trial court's ruling granting these Defendants' Motion for Summary Disposition dismissing Plaintiff's Complaint with prejudice should be affirmed.

II. A NOTICE OF INTENT GIVEN UNDER MCL 600.2912b(4) MUST STRICTLY COMPLY WITH THE STATUTORY REQUIREMENTS.

A. The language of §2912b(4).

Section 2912b(4) specifies in clear and mandatory terminology that the statute requires strict compliance for a Notice of Intent to be properly given. Section 2912b(4) provides:

> The notice given to a health professional or health facility under this section ***shall*** contain a statement of ***at least all*** of the following . . . .

"Shall" means that the statute's requirements are mandatory. The phrases "shall" and "shall not" are unambiguous and denote a mandatory, rather than discretionary action. *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994). The phrase "at least" plainly reflects a minimal requirement. *Roberts v Mecosta County General Hospital*, 466 Mich 57, 65-66; 642 NW2d 663 (2002). "All of the following" means *all* of the following; not some of the following, not most of the following, not substantially all of the following. It means *all*. This language in §2912b(4) distinguishes it from other notice statutes which have applied a lesser standard of compliance than strict compliance. *Cf.* MCL 500.3145 (The No Fault notice statute does not require "at least all.") The inclusion of this language demonstrates a clear intent by the legislature that notices of intent are to be held to a standard of strict compliance and not a lesser standard.

B. To accomplish the statutory purpose of encouraging settlement "strict compliance" is necessary.

The purpose of MCL 600.2912b is to encourage settlement. *Neal v Oakwood Hospital Corporation*, 226 Mich App 701, 705; 575 NW2d 68 (1998). The requirements of §2912b(4) obligate the Plaintiff to disclose specific information, which is not overly

burdensome, so that settlement discussions can be fostered. All of this information is necessary because medical malpractice is not "simple." Medical malpractice cases oftentimes address complex medical issues that are likely to be outside the knowledge of laypersons. At trial, they require expert testimony to assist the trier of fact. MCL 600.2912a. Simply because there is a bad result does not mean there is medical malpractice. *Jones v Porretta*, 428 Mich 132; 405 NW2d 863 (1987). Therefore, §2912b(4) not only obligates the Plaintiff to state the specific information needed to establish her case, it also obligates that the Plaintiff advise Defendants of the strength of that case. It obligates the Plaintiff to "lay her cards out on the table." A Notice of Intent, which does not fully comply with §2912b(4) is likely to be perceived by health professionals and their insurers as lacking merit and not worthy of settlement consideration. By failing to comply with the disclosures required under §2912b(4) settlement discussions will be frustrated rather than encouraged. As a result, if the Court of Appeals August 27, 2002 decision is left uncorrected it will hamper the legislative purpose of encouraging pre-suit settlements. It will relieve plaintiffs in medical malpractice actions

limitations was denied by the trial court. The Court of Appeals reversed and remanded for entry of an order in favor of defendant. The Court explained its reasoning:

> Plaintiffs contend that substantial compliance with the requirements of §2912b resulting in actual notice to the defendant is sufficient to toll the statute of limitations under MCL § 600.5856(d). MSA 27A.5856(d). Resolution of this case turns on issues of statutory interpretation. The goal of statutory interpretation is to identify and to give effect to the intent of the Legislature. *Turner v Auto Club Ins. Ass'n*, 448 Mich 22, 27, 528 N.W.2d 581 (1995); *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 212, 501 N.W. 2d 76 (1993). The first step in ascertaining such intent is to focus on the specific language of the statute. *Turner, supra* at 27, 528 N.W.2d 681. The Legislature is presumed to have intended the meaning it plainly expressed. *McFarlane v. McFarlane*, 223 Mich App. 119, 123, 566 NW. 2d 297 (1997). Accordingly, if the plain language of the statute is clear and unambiguous, further judicial construction is not permitted, and the statute must be applied as written. *Turner, supra* at 27, 528 n.w.2d 6812; *Lorencz V Ford Motor Co.*, 439 Mich 370, 376, 483 N.W.2d 844 (1992).
>
> The language of M.C.L. § 600.5856(d); MSA 27A.5856(d) clearly provides that the statute of limitation is tolled if the notice of intent to sue is given "in compliance with section 2912b." (Emphasis added.) The negative implication of this section is that the statute of limitations is not tolled if the notice of intent to sue does not comply with § 2912b. *The Legislature's use of the word "shall" in subsection 4 of § 2912b makes mandatory the inclusion of the "names of all health professionals" notified of an intention to sue.* See, e.g., *In re Hall-Smith*, 222 Mich. App. 470, 472, 564 N.W.2d 156 (1997) (explaining that use of the word "shall" indicates a mandatory, rather than a discretionary, provision). When understood in its plain and ordinary sense, the word "name" does not encompass the broad description of defendant Vandenberg that was included in the sixth paragraph of plaintiffs' notice of intent to sue. This is so even when that broad description is considered in conjunction with the more specific factual description included in paragraph one of the notice. Simply put, a description is not a name. [FN2] Because the specific statutory language of § 2912b is clear and unambiguous, we are bound to apply it as written. By failing to include defendant Vandenberg's "name" in their notice of intent to sue, plaintiffs failed to comply with a

> specific mandatory requirement of § 2912b(4). Therefore, the statute of limitations was not tolled pursuant to M.C.L. § 600.5856(d); MSA 27A.5856(d), and plaintiffs' complaint naming Vandenberg as a defendant was not timely filed. While there may be strong policy arguments to be made against the "name" requirement of § 2912b(4)(f), this Court is not the proper forum for those arguments. See *Jennings v Southwood*, 446 Mich 125, 142, 521 N.W.2d 230 (1994); *Allstate Ins. Co. v. Dep't of Ins.*, 195 Mich App. 538, 547, 491 N.W.2d 616 (1992).

Rheaume, supra, at 232 Mich App 422. (Emphasis added.) *Rheaume v Vandenberg* is nearly identical to the facts in the instant case. Rather than the identification requirement that is missing in the *Rheaume* case, it is the content requirements of §2912b(4) that are missing in the instant case. Just as the names of all health professionals are mandatory, so is the rest of the information specified in §2912b(4). Regardless of what requirement is missing, the statutory purpose of promotion settlement is frustrated because the Notice of Intent does not contain the required information.

D. Plaintiff's Notice of Intent Fails to Comply with the Requirements of §2912b(4).

Regardless of whether the Plaintiff's Notice of Intent is held to a "strict compliance" standard or a lesser standard such as "substantial compliance," her Notice of Intent is not in compliance with MCL 600.2912b(4). (See Argument I, *supra*, page 5). Plaintiff's Notice of Intent does not meet the "substantial compliance" standard. There is information this statute requires which is not contained in Plaintiff's Notice of Intent. This is not merely a technical violation by Plaintiff. Rather, the lack of information will frustrate the legislative purpose of promoting settlement discussions.

III. BECAUSE THE NOTICE OF INTENT DOES NOT COMPLY WITH §2912b(4) THE STATUTE OF LIMITATIONS IS NOT TOLLED AND PLAINTIFF'S COMPLAINT IS UNTIMELY.

MCL 600.2912b(1) provides that a person "shall not commence an action" unless that person has complied with the notice requirements of the statute and filed a Notice of Intent. MCL 600.5856(d) provides that a medical malpractice plaintiff must comply with the provisions of §2912b to toll the statute of limitations. MCL 600.5856; *Roberts v Mecosta County General Hospital*, 466 Mich 57, 67; 642 NW2d 663 (2002). The statute of limitations in a medical malpractice case is two years. MCL 600.5805(4).

The Plaintiff's claim arose on October 4, 1994. (Appellant's Appendix page 3A). Plaintiff filed her Complaint on February 25, 1997. (Appellant's Appendix, page 1A). Because the Plaintiff filed her Complaint more than two years from the date her claim arose, and because Plaintiff is not entitled to invoke the tolling provision of §5856(d), her claim is barred by the applicable statute of limitations. *See Rheaume, supra.*

RELIEF REQUESTED

For the foregoing reason, Defendants DesNoyers, Davis and OB-GYN respectfully request that this Honorable Court reverse the Court of Appeal's August 27, 2002 Decision and affirm the trial court's June 17, 1998 order granting summary dispostion to Defendants DesNoyers, Davis and OB-GYN.

Respectfully submitted,

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